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No.....

In the Supreme Court of the United States

OCTOBER TERM 1982

CHEVRON U.S.A. INC., a corporation,
Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC.,
NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
ANNE M. GORSUCH, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. In view of the fact that the Court of Appeals for the District of Columbia is the only Circuit Court that can review nationally applicable regulations promulgated by the Environmental Protection Agency, should this Court resolve the three conflicting decisions of that Circuit which create a legal morass with respect to the use of the "bubble concept," a concept which is designed to protect the environment by treating an entire industrial plant, rather than each component thereof, as a single emissions source?

2. Did the Court of Appeals err in substituting its judgment for that of the Environmental Protection Agency on basic policy determinations, where the court below did not, and could not, find the regulations to be unreasonable? In particular, was it unreasonable for the Environmental Protection Agency

(a) to promulgate regulations which simply conformed EPA's regulatory definition of "stationary source" to the definition set forth in the Clean Air Act; and

(b) to promulgate regulations which the undisputed record shows comply with the Congressional purpose in enacting the Clean Air Act?*

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* Petitioners in the proceeding below were Natural Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and Northwestern Ohio Lung Association, Inc.

Respondent in the proceedings below was Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency.

Chevron U.S.A. Inc. was an intervenor-respondent in the proceedings below. Chevron U.S.A. Inc. is a wholly owned subsidiary of Standard Oil Company of California, a publicly owned corporation. Standard Oil Company of California owns stock in the following publicly owned corporations:

Huntington Beach Co.
AMAX, Inc.
Cetus Corp.

Intervenor-respondents in the proceedings below, other than Chevron U.S.A. Inc., are listed in Appendix D.

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting Certiorari	5
I. In Holding That the Environmental Protection Agency Has No Authority to Use the "Bubble Concept"—Which Treats an Entire Industrial Plant, Rather Than Each Component thereof, as the Relevant Unit for Air Pollution Control Purposes—in Nonattainment Areas, the Court of Appeals Has Created a Conflict with Its Prior Decisions Which Can Be Resolved Only by this Court	7
II. In Holding That EPA May Not Promulgate Regulations Using the Bubble Concept in Nonattainment Areas, the Court of Appeals Has Substituted Its Judgment for that of the Environmental Protection Agency on Basic Policy Issues	10
A. The Environmental Protection Agency Regulations in Question Simply Conform the Regulatory Definition of "Statutory Source" to the Definition Set Forth in the Clean Air Act	10
B. The Environmental Protection Agency Regulations in Question Are in Accord with the Legislative History and Purposes of the Clean Air Act	12
Conclusion	16

TABLE OF AUTHORITIES

Cases

Pages

Alabama Power Co. v. Costle, 636 F.2d 323 ..... passim

ASARCO Inc. v. Environmental Protection Agcy., 578 F.2d 319 ..... passim

FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 14

STATUTES

	Pages
28 U.S.C. § 1254(1)	1
Clean Air Act:	
Section 101(b)(1) (42 U.S.C. § 7401(b)(1))	8
Section 110 (42 U.S.C. § 7410)	2
Section 110(a)(2)(I) (42 U.S.C. § 7410(a)(2)(I))	3
Section 111 (42 U.S.C. § 7411)	2
Section 111(a)(3) (42 U.S.C. § 7411(a)(3))	11
Section 111(a)(4) (42 U.S.C. § 7411(a)(4))	11
Section 111(d) (42 U.S.C. § 7411(d))	7
Section 113 (42 U.S.C. § 7413)	7
Section 120 (42 U.S.C. § 7420)	7
Section 160(2) (42 U.S.C. § 7470(2))	8
Section 169(A) (42 U.S.C. § 7491)	7
Section 171 (42 U.S.C. § 7501)	2
Section 171(4) (42 U.S.C. § 7501(4))	11
Section 172 (42 U.S.C. § 7502)	2
Section 172(b)(6) (42 U.S.C. § 7502(b)(6))	2, 10, 11
Section 173 (42 U.S.C. § 7503)	2
Section 173(4) (42 U.S.C. § 7503(4))	3, 14
Section 307(b)(1) (42 U.S.C. § 7607(b)(1))	5

RULES AND REGULATIONS

Pages

40 Code of Federal Regulations §§ 51.18(j), 52.24(f) .. 3, 11

45 Federal Register 52746 ..... 3, 11

46 Federal Register 50771 ..... 3, 11

46 Federal Register 50766 ..... 3, 11

OTHER AUTHORITIES

Pages

House of Representatives Report 294, 95th Congress, 1st Session, p. 211 12

House of Representatives Report 564, 95th Congress, 1st Session, p. 157, 1977 U.S. Code Cong. & Admin. News, p. 1537 12

Landau, *Alabama Power Co. v. Costle:* An End to a Decade of Controversy Over the Prevention of Significant Deterioration of Air Quality? (1980) 10 Environmental Law 585 10

Note, An Overview of the Bubble Concept (1982) 8 Columbia Journal of Environmental Law 137 ..... 6, 10

Reed, *NRDC v. Gorsuch:* D.C. Circuit Bursts EPA's Nonattainment Area Bubble (1982) 12 Environmental Law Reporter 1089 15

Rhinelander, The Bubble Concept: A Pragmatic Approach to Regulation Under the Clean Air Act (1981) 1 Virginia Journal of Natural Resources Law 177 ..... 6, 9

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

OPINIONS BELOW

The opinion and the judgment of the Court of Appeals for the District of Columbia Circuit, dated August 17, 1982, is printed in Appendix A ((D.C. Cir. 1982) 685 F.2d 718). The orders on denial of rehearing en banc are printed in Appendix B.

JURISDICTION

The opinion and the judgment of the Court of Appeals for the District of Columbia Circuit were filed and entered on August 17, 1982 (Appx. A), and its orders denying rehearing were filed and entered October 27, 1982 (Appx. B). This Court has jurisdiction pursuant to § 1254(1) of Title 28 of the United States Code.

STATUTORY PROVISIONS INVOLVED

This case involves §§ 110, 111, 171, 172 and 173 of the Clean Air Act (42 U.S.C. §§ 7410, 7411, 7501, 7502, 7503), the pertinent provisions of which are set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner, *CHEVRON U.S.A. INC.* ("Chevron"), produces, refines, and markets petroleum products. Chevron has spent several hundred million dollars in planning and initiating construction of a modification to its refinery in the San Francisco Bay Area, which may be seriously impeded and stalled if the ruling below is allowed to stand. Chevron's project will *decrease* emissions of all air pollutants from the refinery, generate 1,200 construction jobs and 45 permanent jobs, and produce in excess of $4.5 million in additional yearly tax revenues to the affected city and county. Chevron's project is an example of the many projects which will be adversely affected by the ruling below.

The Clean Air Act establishes a comprehensive Federal-state program to control existing and new sources of air pollution (Appx. A, p. A-4). Pursuant to the Act, the Environmental Protection Agency ("EPA") has prescribed national ambient air quality standards and required all states to adopt, and submit to EPA for approval, State Implementation Plans for attaining those standards. (Appx. A, pp. A-4 to A-5).

The 1977 amendments to the Clean Air Act mandated that the states establish permit programs "for the construction and operation of new or modified major stationary sources" in nonattainment areas, that is, areas which have not yet met the national ambient air quality standards (Appx. C, p. C-28; 42 U.S.C. § 7502(b)(6)). Under the 1977

Clean Air Act Amendments, no permit may be issued unless the state has demonstrated to EPA that its implementation plan assures reasonable further progress toward meeting Federal standards in the nonattainment area in which the proposed source is located (Appx. A, p. A-8; 42 U.S.C. § 7503(4)). If the nonattainment area has no EPA-approved plan, there is a construction moratorium—no major stationary source may be constructed or modified in the area if its emissions will cause or contribute to a violation of ambient standards (Appx. A, p. A-8; 42 U.S.C. § 7410(a)(2)(I)).

On October 14, 1981, EPA adopted a plantwide definition of "stationary source" for nonattainment areas (Appx. A, p. A-11; 46 Fed.Reg. 50766 (Oct. 14, 1981)). Under that definition, a "stationary source" is defined as "any building, structure, facility, or installation," which refers to an entire plant (40 C.F.R. §§ 51.18(j), 52.24(f); 46 Fed.Reg. 50771 (Oct. 14, 1981)).[1]

Under the plantwide definition, a modification would be subject to the construction moratorium or permitting requirements for "major stationary sources" only if the net emission increase from the plant as a whole is above the statutory or regulatory tripwires (Appx. A, p. A-11, n. 26). Modifications which did not increase plantwide emissions above de minimis levels would not be treated as "major modifications" (Appx. A, p. A-11, n. 26). The EPA plantwide definition thus applied the "bubble concept"—an entire plant and its emissions may be viewed as if placed under one bubble (Appx. A, p. A-2, n. 1). Under the bubble concept, air pollution regulations focus on the net effect of changes

1. Previous EPA regulations, repealed on October 14, 1981, had defined "stationary source" to also include each individual piece of equipment at a plant (45 Fed.Reg. 52,746 (Aug. 7, 1980)).

in an entire plant, rather than inspection of each individual unit or piece of equipment within a plant (Appx. A, p. A-2, n. 1).

EPA adopted a plantwide definition of "stationary source" in nonattainment areas for two reasons (Appx. A, p. A-11). First, regulatory complexity would be reduced because the same plantwide definition of stationary source has previously been held to lawfully apply in another program administered by EPA under the Clean Air Act (Appx. A, p. A-11). Second, and more important, the plantwide definition would comply with Congress' mandate that states have the primary responsibility for pollution control, because the plantwide definition allows states greater flexibility in developing nonattainment programs (Appx. A, pp. A-11 to A-12). The bubble concept affords the states flexibility by freeing the enormous time, money and other regulatory resources which would otherwise be required to inspect and issue permits for each and every component of industrial plants (and perhaps every piece of new or modified industrial equipment) in the area. Thus, for example, in a state like California where automobile emissions rather than stationary source emissions are the critical air pollution problem preventing attainment, the bubble concept allows the state to focus resources on automobile emission control, while efficiently limiting net pollution increase from industrial plants below de minimis levels set by regulation and statute (see infra, p. 12).

Respondents Natural Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and Northwestern Ohio Lung Association, Inc. filed a petition for review of the October 14, 1981 EPA regulations (Appx. A, p. A-12). Chevron and various other members of the industrial community intervened in support of the regulations (Appx. A, p. A-12).

The court of appeals vacated EPA's revised regulations, holding that the bubble concept is *per se* inconsistent with the Clean Air Act's nonattainment programs (Appx. A, pp. A-16 to A-18). The court of appeals announced a "bright line test"—based on two cases, *Alabama Power Co.* v. *Costle* (D.C. Cir. 1979) 636 F.2d 323 and *ASARCO Inc.* v. *Environmental Protection Agcy.* (D.C. Cir. 1978) 578 F.2d 319—for determining the propriety of EPA's use of the bubble concept: The concept would be mandatory in programs designed to maintain existing air quality, but per se inappropriate in programs to improve air quality (Appx. A, p. A-16). The court of appeals concluded that the bubble concept was per se inappropriate in the case at bar and considered it unnecessary to determine whether the regulations in question promoted the improvement of air quality or whether the bubble concept was consistent with the language and legislative history of the Clean Air Act (Appx. A, p. A-19).

On October 27, 1982, the court of appeals denied a petition for rehearing; Judge MacKinnon voted to grant a rehearing en banc (Appx. B).

REASONS FOR GRANTING CERTIORARI

This case presents questions of critical importance to the present and future regulation of air pollution which only this Court can resolve and thereby rescue both the regulators and the regulated from the legal quagmire created by the Court of Appeals for the District of Columbia Circuit. Under § 307(b)(1) of the Clean Air Act (42 U.S.C. § 7607(b)(1)), the Court of Appeals for the District of Columbia is the only circuit court that can review nationally applicable regulations promulgated by the Environmental Protection Agency. Thus there can never be a con-

flict between the circuits. Yet a line of decisions of the D.C. Circuit, including the one at bar, are so in conflict as to create havoc throughout the Clean Air Act.

In the case at bar, the court of appeals erroneously held that *Alabama Power Co.* v. *Costle* (D.C.Cir. 1979) 636 F.2d 323 and *ASARCO Inc.* v. *Environmental Protection Agcy.* (D.C.Cir. 1978) 578 F.2d 319 establish a "bright line" test for determining the propriety of EPA's use of the "bubble concept," asserting that:

> "The bubble concept, *Alabama Power* declares, is mandatory for Clean Air Act programs designed merely to maintain existing air quality; it is inappropriate, both *ASARCO* and *Alabama Power* plainly signal, in programs enacted to improve the quality of the ambient air" (Appx. A, p. A-16).

However, it is widely acknowledged, except by the court below, that *ASARCO* and *Alabama Power* are irreconcilably in conflict:

> "*ASARCO* and *Alabama Power* reach opposite conclusions, *interpreting an identical definition* of source but coming to completely different determinations about the validity of the bubble concept. No clear reason emerges from the opinions to explain the differences. Because the D.C. Circuit failed to reexamine *ASARCO* in light of its conclusions in *Alabama Power*, and instead tried to distinguish it, the two decisions leave no clear holding on the validity of the bubble concept" (An Overview of the Bubble Concept (1982) 8 Colum.J.Envtl.L. 137, 151; emphasis added; see Rhinelander, The Bubble Concept: A Pragmatic Approach to Regulation under the Clean Air Act (1981) 1 Va.J.Nat. Resources L. 177, 215).

The test established in the case at bar further exacerbates the confusion already raging with respect to the

bubble concept. The decisions of the D.C. Circuit give no guidance to EPA, the states, the regulated community, or the environmentalists as to the circumstances under which use of the bubble concept would be appropriate with respect to the many other provisions of the Clean Air Act, not yet scrutinized, which utilize the term "stationary source."[2]

Further, the decision is wrong and if not reviewed, not only will 31 states be required to redo their plans for attainment, causing unnecessary waste of limited public resources, but the incentive of industry to modify and retire old, poorly controlled facilities and to develop effective and cost-efficient air pollution control will be reduced, to the future detriment of air quality.

I. IN HOLDING THAT THE ENVIRONMENTAL PROTECTION AGENCY HAS NO AUTHORITY TO USE THE "BUBBLE CONCEPT"—WHICH TREATS AN ENTIRE INDUSTRIAL PLANT, RATHER THAN EACH COMPONENT THEREOF, AS THE RELEVANT UNIT FOR AIR POLLUTION CONTROL PURPOSES—IN NONATTAINMENT AREAS, THE COURT OF APPEALS HAS CREATED A CONFLICT WITH ITS PRIOR DECISION, WHICH CAN BE RESOLVED ONLY BY THIS COURT.

The court of appeals barred EPA from using the bubble concept in areas with air quality below Federal ambient standards, *even though the court could not identify any provisions of the Clean Air Act which would support its decision.* The only rationale offered by the court of appeals was that its prior decisions in *Alabama Power Co.* v. *Costle* (D.C.Cir. 1979) 636 F.2d 323 and *ASARCO Inc.* v. *Environmental Protection Agcy.* (D.C.Cir. 1978) 578 F.2d 319 "establish as the law of this Circuit a bright line test for determining the propriety of EPA's resort to a bubble concept" (Appx. A, p. A-16). That bright line test, the court asserts, is as follows:

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2. See, e.g., 42 U.S.C. §§ 7411(d), 7413, 7420, 7491.

> "The bubble concept, *Alabama Power* declares, is mandatory for Clean Air Act programs designed merely to maintain existing air quality; it is inappropriate, both *ASARCO* and *Alabama Power* plainly signal, in programs enacted to *improve* the quality of the ambient air" (Appx. A, p. A-16; emphasis added).

In fact the decision in the case at bar directly conflicts with the court's *Alabama Power* decision, and *Alabama Power* and *ASARCO* are irreconcilable. In *Alabama Power*, EPA employed the bubble concept under the provisions of the Clean Air Act enacted "to preserve, protect, and *enhance* the air quality" in areas which have already met Federal air quality standards (42 U.S.C. §§ 7470(2), 7401(b)(1); emphasis added). That case held that the bubble concept was consistent with the relevant provision of the Act and approved EPA's use of the bubble concept. In *Alabama Power* the court of appeals approved the use of the bubble concept under provisions of the Act enacted to improve air quality, thus rejecting the approach taken in the opinion below. Moreover, the purpose for enacting the nonattainment provisions involved here was in essence the same as that for enacting the provisions involved in *Alabama Power*, i.e., "to protect and enhance" air quality (42 U.S.C. § 7401(b)(1)). To say, as the court below did, that the two programs had different purposes and therefore required different results simply strains credulity and conflicts with the plain words of the Clean Air Act.

Further, as several commentators have observed, the decision in *Alabama Power* conflicts with the court of appeals' prior decision in *ASARCO Inc.* v. *Environmental Protetction Agcy.* (D.C.Cir. 1978) 578 F.2d 319. In *ASARCO*, the majority held that EPA regulations incorpo-

rating the bubble concept were inconsistent with the Clean Air Act's provisions governing new source performance standards ("NSPS"). The *ASARCO* majority held that EPA could not define a "stationary source" of pollution as including a combination of facilities within a plant—a definition which would have broadly applied the bubble concept.

Some two years after *ASARCO, Alabama Power* held that EPA could apply the bubble concept to the prevention of significant deterioration ("PSD") provisions of the Act, notwithstanding that the term "'stationary source'" is defined exactly the same for both the PSD and NSPS provisions as a " 'building, structure, facility, or installation' " (636 F.2d 395). *Alabama Power* held that EPA could define "stationary source" to encompass an entire plant.

> "The remarkable result of the *Alabama Power* case is that, by a judicial tour de force, the judges unanimously distinguished *ASARCO* and accepted the arguments of industry and EPA that the bubble policy • • • in fact was required by the Act. Whereas in *ASARCO*, the majority had swallowed fully the environmentalists' argument that no bubble was permissible, and had castigated EPA for taking an unsupportable compromise position, in *Alabama Power*, the judges rejected the environmentalists' contentions and found that EPA had not gone far enough in allowing the bubble.
>
> "The two decisions produce an inconsistent result" (Rhinelander, The Bubble Concept: A Pragmatic Approach to Regulation under the Clean Air Act (1981) 1 Va.J.Nat.ResourcesL. 177, 215).

As to the distinctions the *Alabama Power* decision attempted to draw:

> "The four reasons given by the court simply do not add up. There is too much similarity between the

two cases for *ASARCO* to be ignored. That is not to say that the court erred in approving the bubble concept in *Alabama Power*. On the contrary, the concept's rationality seems manifest. But there remains a conflict between the *ASARCO* and *Alabama Power* decisions too important to be passed over. It is the *ASARCO* case that should have been reexamined in light of the *Alabama Power* ruling" (Landau, *Alabama Power Co. v. Costle:* An End to a Decade of Controversy over the Prevention of Significant Deterioration of Air Quality? (1980) 10 Envtl.L. 585, 626; see 8 Colum.J.Envtl.L., supra, pp. 149-151).

It should also be noted that the opinion below does not even purport to apply those distinctions to the Clean Air Act provisions in question; instead the court of appeals now advances a new bright line test. That court's failure to adhere to the criteria followed in its prior decision in *Alabama Power* is a virtual concession that *Alabama Power, ASARCO,* and the instant case cannot be reconciled; they create a hopeless legal morass.

II. IN HOLDING THAT EPA MAY NOT PROMULGATE REGULATIONS USING THE BUBBLE CONCEPT IN NONATTAINMENT AREAS, THE COURT OF APPEALS HAS SUBSTITUTED ITS JUDGMENT FOR THAT OF THE ENVIRONMENTAL PROTECTION AGENCY ON BASIC POLICY ISSUES.

A. The Environmental Protection Agency Regulations In Question Simply Conform the Regulatory Definition of "Stationary Source" to the Definition Set Forth in the Clean Air Act.

The Clean Air Act provides no support for the ruling below. The bubble concept, and the EPA regulations implementing that concept in nonattainment areas, are entirely consistent with the provisions of the Act. Section 172(b)(6) of the Clean Air Act provides that the states establish permit programs "for the construction and operation of new or modified major stationary sources" (Appx. C, p. C-28;

42 U.S.C. § 7502(b)(6)) in nonattainment areas. For purposes of the nonattainment provisions of the Act: "The terms 'modifications' and 'modified' mean the same as the term 'modification' as used in section 111(a)(4) of this Act" (91 Stat. 746; Appx. C, p. C-28; 42 U.S.C. § 7501(4)). Section 111(a)(4) of the Act defines "modification" as: "any physical change in, or change in the method of operation of, a *stationary source* which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted" (Appx. C, p. C-27; 42 U.S.C. § 7411(a)(4); emphasis added). The term "stationary source" as used in § 111(a)(4) is itself defined in § 111(a)(3): "The term 'stationary source' means *any building, structure, facility, or installation* which emits or may emit any air pollutant" (Appx. C, p. C-27; 42 U.S.C. § 7411(a)(3); emphasis added).

The 1981 regulations in question here simply conformed EPA's definition of stationary source to the statutory provisions of the Clean Air Act by defining stationary source as "any building, structure, facility, or installation," *the precise definition in section 111(a)(3) of the Act* (see 46 Fed.Reg. 50771 (Oct. 14, 1981); 40 C.F.R. §§ 51.18(j), 52.24 (f)). The prior 1980 regulations had further defined the term "installation" as "an identifiable piece of process equipment"—a definition which appears nowhere in the Act (45 Fed.Reg. 52746 (Aug. 7, 1980)). In 1981, EPA simply repealed its prior regulations defining "installation" as an identifiable piece of process equipment (46 Fed.Reg. 50766 (Oct. 14, 1981)).

Certainly, in so conforming the definition, EPA could not have committed a per se violation of the Act as the court of appeals held. In any event, EPA acted rationally, reasonably, and well within both the terms of the Act and

its agency discretion in promulgating the 1981 regulations. Those regulations allow plant modernization or expansion to proceed in areas without EPA approved plans only if any net emission increase from the plant as a whole is below the regulatory and statutory threshold. Nothing in the Clean Air Act suggests—much less requires—that EPA should define "stationary source" so as to require permits for each individual piece of equipment in a plant.

B. The Environmental Protection Agency Regulations in Question Are In Accord with the Legislative History and Purposes of the Clean Air Act.

The uncontroverted facts and legislative history establish that the bubble concept promotes the purposes of and is consistent with the nonattainment provisions of the Act.

Congress clearly and unambiguously stated that the nonattainment provisions of the Act had

> "• • • two main purposes: (1) to allow reasonable economic growth to continue in [a nonattainment] area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow States greater flexibility for the former purpose than EPA's present interpretative regulations afford" (H.R.Rep.No. 294, 95th Cong., 1st Sess., p. 211 (1977)).[3]

Had the court of appeals considered whether the bubble concept is consistent with those purposes, the uncontroverted factual record before EPA and the court of appeals would have shown that the bubble concept will not

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3. That this is the relevant legislative history is made clear by the Conference Report; the permit program for new and modified sources in nonattainment areas was taken from the House Bill (H.R.Rep.No. 564, 95th Cong., 1st Sess., p. 157 (1977); 1977 U.S. Code Cong. & Admin. News, p. 1537).

contravene or in any way impede those objectives. The bubble concept affords the states flexibility: In some states, where automobile emissions rather than stationary source emissions prevent the state from meeting Federal air quality standards, use of the plantwide bubble concept is irrelevant to attainment of those standards.[4] The bubble concept would enable these states to reallocate their resources to automobile emission control, rather than waste limited regulatory resources on inspection and the issuance of permits for each and every piece of industrial equipment in nonattainment areas. Numerous other states are anxious to demonstrate that use of the bubble concept is fully consistent with timely attainment of air quality standards in the most expeditious and cost-effective manner.[5] But the ruling below precludes any state from using the bubble concept, regardless of whether that concept suits its needs.

Moreover, the bubble concept is consistent with Congress' goal of allowing reasonable economic growth while the states make reasonable further progress to attainment of Federal air quality standards. The bubble concept encourages modernization and expansion of industrial plants, and "reasonable further progress" is assured because the EPA regulations in question allow a state to issue construction permits for industrial plants only if the state has demonstrated to EPA that its air quality plan assures reasonable further progress toward meeting air quality stand-

4. See, e.g., comments of the Arizona Department of Health Services (Appx. (D.C.Cir.) p. 151).

5. See, e.g., comments of the California Air Resources Board (Appx. (D.C.Cir.) p. 118); Ohio Regional Air Pollution Control Agency (Appx. (D.C.Cir.) p. 122); New York State Department of Environmental Conservation (Appx. (D.C.Cir.) p. 126); Missouri Department of Natural Resources (Appx. (D.C.Cir.) p. 134); Ohio EPA (Appx. (D.C.Cir.) p. 155).

ards (Appx. C, p. C-29; 42 U.S.C. § 7503(4)). But, the ruling below prohibits use of the bubble concept even where it is expressly found by EPA and the states to be consistent with attainment of the Clean Air Act goals.

In contrast to the economic growth allowed by the bubble concept, the ruling below results in a stifling of economic growth, contrary to the express goals of Congress. The Clean Air Act requires a construction moratorium in nonattainment areas without EPA-approved plans, but the terms of the Act apply that moratorium only to "major stationary sources" with emissions increases above threshold levels established by statute. The ruling below, however, will result in a moratorium on expansions or modifications of plants with net emission increases *below those threshold levels*. By prohibiting all use of the bubble concept in nonattainment areas, the court of appeals has extended the construction moratorium to projects in which a proposed piece of equipment or unit within a plant would increase emissions, even if the expansions or modifications to the plant as a whole would not exceed statutory limits. These industrial projects will simply not be constructed if the ruling below is allowed to stand.

In holding that EPA may not promulgate regulations using the bubble concept, the court of appeals has substituted its judgment for that of EPA on basic policy issues. This Court has often recognized that the courts may not substitute their judgment for that of administrative agencies; an agency's regulation may not be upset so long as there is a rational basis for the regulation (*FCC* v. *National Citizens Comm. for Broadcasting* (1978) 436 U.S. 775). The court of appeals, however, prohibited EPA from using the bubble concept in nonattainment areas *solely because of its policy judgment that the bubble concept would*

cause unacceptable harm to air quality. But this policy judgment of the court below is contrary to the judgment of EPA and the judgment of Congress: Under the plantwide definition of "stationary source" in nonattainment areas adopted by EPA, a project would be allowed to proceed only if any net emission increase from the plant as a whole is below the maximum levels *allowed by statute.* Thus, any increase in emissions from a plant using the bubble concept is, by definition, of a de minimis amount which *Congress has found to be acceptable and consonant with achievement of attainment in nonattainment areas.* The court of appeals may not second-guess the judgment of Congress in setting the acceptable levels of emissions, nor may the court usurp EPA's judgment in fashioning regulations to meet those levels.

One commentator has already noted that the decision of the court of appeals involves a basic policy decision with far-reaching implications for the Clean Air Act:

> "The ease with which the court cut through the tangle of vague statutory provisions and conflicting precedent was, to some, as unexpected as the result. This approach enabled the court to give an unambiguous answer to the question of the legality of netting in nonattainment areas, but produced a rationale with broader implications for the EPA Emission Trading Policy. Whether the decision stands as a lasting solution to the puzzle posed by the definition of 'source' or merely provokes another solution from Congress or a higher court, it can be said that, for better or worse, it raises the focus of the debate from the legal detail to the basic policy issues at stake" (Reed, *NRDC v. Gorsuch:* D.C. Circuit Bursts EPA's Nonattainment Area Bubble (1982) 12 Envtl.L.Rep. 10089, 10095-10096).

Certiorari should be granted not to resolve these policy issues, but rather to make clear that EPA has discretionary authority to promulgate regulations addressing these issues.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2208

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC.,
NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
PETITIONERS

v.

ANNE M. GORSUCH, ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY

AMERICAN PETROLEUM INSTITUTE, ET AL.,
AMERICAN IRON AND STEEL INSTITUTE,
RUBBER MANUFACTURERS ASSOCIATION, INC.,
GENERAL MOTORS CORPORATION,
ALABAMA POWER COMPANY, ET AL.,
CHEMICAL MANUFACTURERS ASSOCIATION, INTERVENORS

Petition for Review of an Order of the
Environmental Protection Agency

Argued May 21, 1982
Decided August 17, 1982

Before: MIKVA and GINSBURG, *Circuit Judges,* and WILLIAM J. JAMESON,* *Senior United States District Judge* for the District of Montana.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge:* This case involves a dispute between the Environmental Protection Agency ("EPA")

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

supported by industry intervenors, and petitioning environmental associations concerning EPA's application of a "bubble concept"[1] to a discrete Clean Air Act (or "Act") scheme, the new source review requirements for areas in which air quality does not meet federal standards ("nonattainment areas").[2] The controversy centers on the appropriate definition of the word "source" for the purpose of implementing the statutory scheme. Under EPA's current, bubble concept regulation, effective October 14, 1981,[3] source means an entire plant. Under the regulation previously in force,[4] an individual piece of process equipment within the plant ranked as a source. EPA changed its definition of source expressly to cut back substantially the coverage of nonattainment area new source review.[5]

In ruling upon EPA's regulatory change, we do not write on a clean slate. Our course is marked by two prior decisions in which panels of this court determined the applicability *vel non* of the bubble concept to distinct Clean Air Act programs. In *Alabama Power Co. v. Costle,* 636 F.2d 323 (D.C. Cir. 1979), the court held EPA *must* employ the concept in the Act's Prevention of Significant Deteriora-

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1. Under this concept an entire plant and its emissions are viewed as if placed under one bubble. One then "look[s] at any change proposed for [the] plant and decide[s] whether the net effect of all the steps [taken in conjunction with the] change is to increase the emission of any air pollutant." Without the bubble concept, individual units of a plant affected by an operational change would be inspected to "determine whether any of the units will consequently emit more of a pollutant." Alabama Power Co. v. Costle, 636 F.2d 323, 401 (D.C. Cir. 1979); *see* ASARCO, Inc. v. EPA, 578 F.2d 319, 322 (D.C. Cir. 1978).

2. *See* 42 U.S.C. §§ 7410(a)(2)(I), 7501-7508 (Supp. IV 1980).

3. 46 Fed. Reg. 50766 (1981) ("1981 Regulations").

4. *See* 45 Fed. Reg. 52676, 52696-98 (1980) ("1980 Regulations").

5. *See* 1981 Regulations, 46 Fed. Reg. at 50766.

tion ("PSD") regime, a scheme designed to *maintain* air quality in clean air areas; in *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), the court *ruled out* application of the concept to national new source performance standards ("NSPSs") which the Act directs EPA to set with a view to *enhancing* air quality. In each case the court focused on the purpose Congress envisioned for the particular program at issue. *ASARCO* declared the bubble concept impermissible when the congressional objective was improvement, rather than simply preservation, of existing air quality. *See* 578 F.2d at 327-29; *see also id.* at 330 (Leventhal, J., concurring) (challenged regulations would contravene congressional policy contemplating that modification of a facility would bring about air quality improvement). *Alabama Power* held the concept "precisely suited" to the congressional design when the intent was "to preserve [existing] air quality," rather than to improve it. 636 F.2d at 402.

Congress, EPA does not dispute, intended the new source review requirements to operate not simply as a quality-maintaining scheme but specifically to promote the cleanup of nonattainment areas.[8] We are therefore impelled by the force of our precedent in *Alabama Power* and *ASARCO*

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8. *See* 1981 Regulations, 46 Fed. Reg. at 50769-70; EPA Brief at 27 (a "fundamental purpose of [the nonattainment program] is to enhance air quality").

During the floor debates on the 1977 Amendments to the Act, Senator Dole made the following statement comparing goals of the nonattainment and PSD programs:

> For concentrated industrial areas [the amendments] will involve an effort to clean up ambient air quality to the extent possible, while for relatively "clean" areas like Kansas, the effort will involve a reasonable approach to maintaining healthy air standards in the face of future development.

123 Cong. Rec. 18167 (1977).

to hold that EPA's regulatory change, its employment of the bubble concept to shrink to relatively small size mandatory new source review in nonattainment areas, is impermissible.[7]

I. Background

A. *The Statutory Framework*

Congress substantially redesigned the Clean Air Act in 1970 amendments[8] to better "'protect and enhance the quality of the Nation's air resources.'"[9] The amendments established a comprehensive federal-state program to control existing and new sources of air pollution.[10] Central to the new design, Congress charged EPA to prescribe national ambient air quality standards ("NAAQSs"),[11] and

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7. *See* Potomac Alliance v. NRC, ... F.2d ....., ..., No. 80-1862, slip op. at 3 (D.C. Cir. July 20, 1982) ("[m]indful of our rules with respect to the maintenance of uniformity in dispositions of like cases by different divisions of this court").

We express no view on the decision we would reach if the line drawn in *Alabama Power* and *ASARCO* did not control our judgment.

8. Pub. L. No. 91-604, 84 Stat. 1676 (1970).

9. *ASARCO*, 578 F.2d at 321 (quoting Clean Air Act § 101(b)(1), 42 U.S.C. § 1857(b)(1) (1970), and citing W. Rogers, Environmental Law § 3.1 (1977)).

10. This court has previously identified various motivations precipitating these amendments. *See, e.g., Alabama Power*, 636 F.2d at 346 (amendments were in response "to the growing perception of air pollution as a serious national problem"); *ASARCO*, 578 F.2d at 321 (amendments "were passed in reaction to the failure of the states to cooperate with the federal government in effectuating the stated purposes of the Act" and "were designed 'to improve the quality of the nation's air,' 84 Stat. 1676 (1970), by increasing the federal government's role in the battle against air pollution").

11. Section 109 of the Act, now codified at 42 U.S.C. § 7409 (Supp. IV 1980), required the Administrator of EPA to establish two sets of ambient air quality standards: "primary standards," "requisite to protect the public health," 42 U.S.C. § 7409(b)(1) (Supp. IV 1980); and "secondary standards," "requisite to protect the public welfare." *Id.* § 7409(b)(2).

required all states to adopt, and submit to EPA for approval, State Implementation Plans ("SIPs") that provide for the timely attainment of the NAAQSs.[12]

By 1976, it was clear that many regions of the country had failed to attain the primary NAAQSs within the statutory deadline, and remained distant from those national standards. In light of this shortfall, EPA endeavored to clarify, in an interpretive rule, the circumstances in which new sources of pollution would be permitted in areas where an ambient standard had not been achieved. EPA Interpretative Ruling of December 21, 1976 ("Offset Ruling"), 41 Fed. Reg. 55524 (1976); *see* S. Rep. No. 127, *supra* note 12, at 55.[13] Congress, however,

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12. The statute directed that SIPs provide for (1) attainment of primary standards "as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan[s]" (not later than May 31, 1975, in most cases, *see* S. Rep. No. 127, 95th Cong., 1st Sess. 55 (1977)); and (2) attainment of secondary standards within "a reasonable time." 42 U.S.C. § 7410(a)(2)(A) (Supp. IV 1980). Congress further instructed the Administrator of EPA to approve a submitted SIP if the plan met the requirements of the Act, *id.* § 7410(a), and if it did not, or if no plan was submitted, to propose and implement a plan for the state. *Id.* § 7410(c)(1).

13. Under the Offset Ruling, a "major" new or modified source would be allowed to locate in a nonattainment area "only if [certain] stringent conditions" could be met. 41 Fed. Reg. at 55528. First, emissions from existing sources in the region must be reduced by an amount greater than the contemplated emissions from the proposed new or modified source. *Id.* at 55529. Second, the source was "required to meet an emission limitation which specifies the lowest achievable emission rate for such type of source." *Id.* at 55528; *see also infra* note 20. Finally, the owner or operator of the proposed source had to certify that all existing sources in the area under the owner's or operator's control were in compliance with all applicable SIP requirements or on an approved compliance schedule. 41 Fed. Reg. at 55529. A "major" new or modified source was defined as any source which had an allowable emission rate of 100 or more tons per year (1000 tons for carbon monoxide). *Id.* at 55528.

This Ruling was later amended to conform to the 1977 Amendments to the Clean Air Act and codified as Appendix S to 40 C.F.R. Part 51. *See* 44 Fed. Reg. 3274 (1979).

"[b]eliev[ed] that a statutory clarification of the question [was] needed," *id.*, and therefore added to its 1977 Clean Air Act Amendments,[14] Part D to Title I of the Act.[15]

Part D required states with nonattainment areas to submit revised SIPs not later than January 1, 1979. 42 U.S.C. § 7502 note (Supp. IV 1980). These revised SIPs must demonstrate that the primary NAAQSs will be attained "as expeditiously as practicable," but not later than December 31, 1982, or "if the State demonstrates to the satisfaction of the Administrator . . . that such attainment is not possible in an area with respect to either [ozone or carbon monoxide (or both)], . . . not later than December 31, 1987." *Id.* § 7502(a). The SIPs must also "provide for the implementation of all reasonably available control measures as expeditiously as practicable." *Id.* § 7502(b)(2). Until the NAAQSs are attained, "reasonable further progress" towards the standards must occur in each intervening year. *Id.* § 7502(b)(3).[16]

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14. The expanded nonattainment program was only one part of Congress' extensive 1977 revisions to the Clean Air Act. For detailed discussion of another major aspect of the 1977 Amendments, the PSD program, see generally *Alabama Power*.

15. Pub. L. No. 95-95, 91 Stat. 685, 745-51, codified at 42 U.S.C. §§ 7501-7508 (Supp. IV 1980). The provisions of Part D, applicable to nonattainment areas as defined by Section 107(d) of the Act, 42 U.S.C. § 7407(d), are incorporated into the requirements of an adequate SIP. 42 U.S.C. § 7410(a)(2)(I).

16. The term "reasonable further progress" means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part [42 U.S.C. §§ 7501-7508] and section 7410(a)(2)(I) of this title and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 7502(a) of this title. 42 U.S.C. § 750(1).

At the heart of the present dispute are two features of Congress' 1977 alterations: the Part D permit program, *id.* § 7502(b)(6), and the prohibition of major new construction in nonattainment areas lacking a SIP that meets the Part D requirements ("construction moratorium"), *id.* § 7410(a)(2)(I). Part D mandates that SIPs establish a permit program "for the construction and operation of new or modified major stationary sources" in nonattainment areas. *Id.* § 7502(b)(6).[17] States may issue a permit for construction or modification[18] of a major[19] source only if four conditions are met. First, the increased emissions from the proposed source must not exceed the allowance for growth identified and quantified in the SIP pursuant to 42 U.S.C. § 7502(b)(5) or, alternatively, the applicant must obtain sufficient reductions in emissions in the nonattainment area to offset the increased emissions from the proposed source. *Id.* § 7503(1). Second, the proposed source must comply with the "lowest achievable emission rate

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17. Emissions from mobile sources, not at issue here, are regulated by Title II of the Act, *id.* §§ 7521-7574.

18. "'[M]odification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *Id.* § 7411(a)(4).

19. A "major" new source is one "which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant . . . ." *Id.* § 7602(j). *See also* 40 C.F.R. § 51.18(j)(1)(v)(a) (1981). A "major" modification is one that results in a "significant" increase of any pollutant. *Id.* § 51.18(j)(1)(vi). The significance levels currently in force are:

Carbon monoxide: 100 tons per year (tpy)
Nitrogen Oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy

Id. § 51.18(j)(1)(xiii).

(LAER).'[20] *Id.* § 7503(2). Third, the applicant must demonstrate that all other major sources in the state under its control are in compliance (or are on a schedule for compliance) with applicable emissions limitations. *Id.* § 7503(3).

Finally, no permit may be issued unless the state is carrying out the applicable implementation plan for the nonattainment area in which the proposed source is to be located. *Id.* § 7503(4). If the nonattainment area lacks an EPA-approved SIP that meets Part D's requirements, the "construction moratorium" becomes operative and "no major stationary source [that would emit the nonattainment pollutant(s)] shall be constructed or modified in [the] area." *Id.* § 7410(a)(2)(I).[21]

B. *EPA's Regulations*

Part D, dense as it is, does not explicitly define what Congress envisioned as a "stationary source" to which the permit process and construction moratorium should apply. Nor is the issue squarely addressed in the legislative history. By regulation, EPA has twice attempted to provide a clear-cut answer. The response it gave on August 7, 1980, rested on the notion that Congress intended new source review to be "an important tool in the drive towards attainment of ambient air quality standards," 45 Fed. Reg. 52676, 52697 (1980) ("1980 Regulations"); EPA therefore designed its definition to subject to review more new construction projects in areas with unhealthy air than in areas where the legislative objective was simply to prevent

20. *See* 42 U.S.C. § 7501(3) (defining LAER).

21. The statutory provision for a "construction moratorium" carries a July 1, 1979, effective date. Prior to that date, EPA's Offset Ruling, *see supra* note 13, governed construction and modification of major pollution sources. 42 U.S.C. § 7502 note.

significant deterioration of healthy air. On October 14, 1981, EPA, upon reconsideration, dramatically altered its "source" definition. This time, the agency focused on the "regulatory burdens and complexities" the 1980 definition entailed, 46 Fed. Reg. 16280, 16281 (1981), and on a "state flexibility" concern. 46 Fed. Reg. 50766, 50767 (1981) ("1981 Regulations"). To reduce the reach of the permit and moratorium requirements, EPA conformed the nonattainment area definition of source to the definition applicable, under the PSD program, in clean air areas.

1. *The 1980 Regulations.*

In its August 7, 1980, nonattainment program implementing regulations, 45 Fed. Reg. 52676 (1980), EPA defined as a "stationary source," "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act." *Id.* at 52746.[22] The regulations further defined "building, structure, [and] facility" to mean, essentially, an entire plant.

22. This specification is identical to the one Congress supplied for the term "stationary source" in the context of the NSPS program. 42 U.S.C. § 7411(a)(3); *see ASARCO*, 578 F.2d at 322. EPA appropriately used the same specification, although Congress had supplied none, in identifying the constituents of "stationary source" for purposes of the nonattainment program. *See Alabama Power*, 636 F.2d at 396. However, EPA, it is not disputed, has authority to define the constituent terms of source enumerated in the statute ("building, structure, facility, or installation") in a manner that will best effectuate "the expressed purposes of the Act." *Id.* In this case, EPA has maintained throughout, the agency may select the definition "best suited to the nonattainment program." 1981 Regulations, 46 Fed. Reg. at 50769; *see* 1980 Regulations, 45 Fed. Reg. at 52697. As *Alabama Power* and *ASARCO* illustrate, different delineations may be appropriate for different statutory programs. *See Alabama Power*, 636 F.2d at 402; *ASARCO*, 578 F.2d at 327-28.

Id.[23] "Installation," however, was defined as "an identifiable piece of process equipment." *Id.* Defining "source" as both a plant and an individual piece of equipment at a plant (a "source" within a "source") is commonly termed the "dual definition." *See id.* at 52696, 52697.[24]

EPA gave two imbricated reasons for adopting the dual definition to implement Part D of the Act. First, EPA inferred from the purpose, detail, and history of Part D that Congress intended application of new source review "to the greatest extent possible." *Id.* at 52697. "The dual definition, by defining individual units as a 'source,' will bring more units in for review in areas with unhealthy air," EPA stated, therefore "use of [this] definition clearly is more consistent with Congressional intent." *Id.* Second, EPA observed that "the purpose of the nonattainment provisions is to 'positively reduce emissions,' not merely to hold emissions constant." *Id.* EPA therefore concluded

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23. EPA's precise definition reads:

> "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two-digit code) as described in the following document, *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

1980 Regulations, 45 Fed. Reg. at 52746.

24. Simultaneously, EPA rejected the dual definition for the PSD program, defining "installation" in that context, along with "building," "structure," and "facility," to mean an entire plant. *See id.* at 52693 (fundamental difference in purpose of the PSD provisions (to prevent air quality deterioration) and the nonattainment provisions (to reduce emissions) requires a different approach to defining the sources that will be subject to new source review).

that the dual definition "comports with the purposes of Part D," while "use of a plantwide definition to avoid new source review would appear to be inappropriate in nonattainment areas." *Id.*[25]

The August 7, 1980, regulations contained a further provision at issue here. EPA ruled that "reconstructed facilities" at a plant would be treated as new sources rather than modifications of existing sources. *Id.* at 52744. "Reconstruction" would be presumed whenever "the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost of a comparable entirely new stationary source." *Id.*

2. *The 1981 Regulations.*

On October 14, 1981, the EPA repealed the dual definition trigger for new source review in nonattainment areas and adopted a plantwide definition of "stationary source." 46 Fed. Reg. 50766 (1981).[26] Two concerns, EPA asserted, motivated this volte-face. First, regulatory complexity would be reduced for now the same definition of "source" would apply to both the PSD and nonattainment programs. *Id.* at 50767. Second, "and more important," EPA said, the

25. EPA recognized that "use of different definitions for PSD and nonattainment areas adds to the compexity of the permitting process,' but regarded this additional complexity as "outweighed by the need for a more inclusive definition of source in nonattainment areas in order to assure attainment of standards." *Id.* at 52697.

26. The practical effect of this revision was to apply the "bubble concept" to the nonattainment program. *See supra* note 1. Under this concept, only if the net emission increase from the plant as a whole is above the statutory or regulatory tripwire would the project qualify as a major new or modified source. *See ASARCO*, 578 F.2d at 322. Therefore, an operator of an existing plant could avoid the permitting process by "offsetting any increase in pollution caused by a change in the plant . . . against a decrease in pollution from other units within the plant." *Id.*

action is faithful to Congress' mandate that states "play the primary role in pollution control," for the plantwide definition of source "allow[s] states much greater flexibility in developing their nonattainment . . . programs." *Id.*[27]

EPA also deleted the requirement that reconstructed facilities, as defined in the August 7, 1980, regulations, be treated as new sources; the agency explained:

> Adoption of the plantwide definition means that the reconstruction requirement applies only to entire plants which are rebuilt. Since few if any such reconstructions are anticipated, there is little reason to retain this requirement. In addition, deletion of the requirement makes the PSD and nonattainment rules the same in this respect.

Id.

On November 18, 1981, Natural Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and Northwestern Ohio Lung Association, Inc. (collectively "Petitioners") filed the instant petition for review of EPA's October 14, 1981, regulations. Various members of the industrial community intervened in support of the altered regulations.[28]

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27. On March 12, 1981, EPA announced the proposed change in the scope of nonattainment area new source review as a decision "made in the context of a Government-wide reexamination of regulatory burdens and complexities that is now in progress." 46 Fed. Reg. 16280, 16281 (1981) ("Notice"). EPA cited its concern that the dual definition "is excessively and unnecessarily burdensome," *id.*, but it did not then publish its concern, later identified as "more important," to increase options and flexibility for the states.

28. Some of the intervenors had petitioned this court to review EPA's August 7, 1980, regulations. Chemical Manufacturers Ass'n v. EPA, Nos. 80-1973 et al. (filed Aug. 15, 1980), *consolidated with* Nos. 79-1112 et al. (Dec. 15, 1980). On February 22, 1982, in response to promulgation of the October 14, 1981, revisions, a settlement agreement in that case was filed with this court.

II. Analysis

A. *The Bubble Concept*

As stated at the outset, the central issue confronting us is whether EPA's discretion under the Clean Air Act is sufficiently broad to allow it to apply the bubble concept to the nonattainment program. Our decision, we earlier observed, is controlled by two recent adjudications of this court determining the propriety of the bubble concept as applied to two other Clean Air Act programs. We now turn to a closer examination of those prior decisions.

In *Alabama Power* this court concluded that EPA, to act consistently with the purposes of the PSD program (Part C of Title I of the Act),[29] must apply the bubble concept to that regulatory scheme. 636 F.2d at 401-02. In reaching this conclusion the court reviewed, in light of Part C's language and its legislative history, definitions EPA had issued for the PSD program.

First, the court stated that in the absence of contrary congressional intent, the word "source" is to be defined consistently throughout the Act, as Congress defined it explicitly in Section 111(a)(3), to "mean[] any building, structure, facility, or installation. . . ."[30] Finding no contrary legislative intent with respect to the PSD program, the court held that the Section 111(a)(3) definition governed all PSD provisions. 636 F.2d at 396. Therefore, the court ruled, EPA exceeded its authority when it augmented the components of "source," for Part C definitional purposes, to embrace "any structure, building, facility, *equipment,* installation, *or operation (or combination thereof)* . . . ." *See id.* at 395 (emphasis in original).

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29. 42 U.S.C. §§ 7470-7491 (Supp. IV 1980).

30. *Id.* § 7411(a)(3).

However, the court further ruled that EPA has discretion to define, by regulation, the four components of the word "source" (building, structure, facility, and installation) "to carry out the expressed purposes" of the program at issue. *See id.* at 396. In sum, the court recognized that EPA might adopt for one Clean Air Act program regulations defining "the component terms of 'source' that are different in scope from" regulations employed in another program "due to differences in the purpose and structure of the two programs." *Id.* at 397-98.

Applying this analysis, the court declared the bubble concept "precisely suited" to the goals of the PSD program, *"preserv[ing]* air quality within a framework that allows cost-efficient, flexible planning for industrial expansion and improvement." *Id.* at 402 (emphasis added).[31] A point-specific definition of source, in the *Alabama Power* panel's view, would be "contrary to the expressed purposes of the PSD provisions of the Act." *Id.* at 401.[32] The panel regarded its decision as entirely in harmony with this court's decision less than two years earlier in *ASARCO, Inc. v. EPA,* for *"ASARCO* . . . dealt with a significantly different regulation and statutory purpose." *Id.* at 402; *cf. infra* note 37.

In *ASARCO* the court "rejected *in toto"* EPA's appli-

31. Accommodating this conclusion within its holding that Congress had constrained EPA's authority to identify the component terms of "source," the court observed that "installation . . . in its common usage" can mean an entire plant. 636 F.2d at 397.

32. The court acknowledged that Congress did not specify, in either the language or the legislative history of Part C, "which of [the] two constructions [the bubble concept or the individual unit approach] was to be controlling." *Id.* (footnote omitted).

cation of the bubble concept[33] to the NSPS program.[34] 578 F.2d at 325, 326-27. In addition to finding the bubble regulations inconsistent with the plain language of the Act,[35] the court found them contrary to the basic purpose of the NSPS program, to "*improve*[] air quality." *Id.* at 327 (emphasis in original). "The bubble concept in the challenged regulations would undercut [the NSPS program] by allowing operators to avoid installing the best pollution control technology on an altered facility as long as the emissions from the entire plant do not increase."[36] *Id.* at 327-28.[37]

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33. Specifically, EPA had adopted regulations which defined "stationary source" to mean "any building, structure, facility or installation which emits or may emit any air pollutant and *which contains any one or combination of the following:*

(1) Affected facilities.

(2) Existing facilities.

(3) Facilities of the type for which no standards have been promulgated in this part."

See 578 F.2d at 324 (quoting 40 C.F.R. § 602(d) (1976)) (emphasis in original).

34. The NSPS program is designed to force new "sources" of pollution to employ the best demonstrated systems of emission reduction. 42 U.S.C. § 7411 (Supp. IV 1980).

35. *Compare* 42 U.S.C. § 7411(a)(3) (Supp. IV 1980) *with* language quoted in note 33.

36. The court further stated:

> Treating whole plants as single sources would grant the operators of existing plants permanent easements against federal new source standards—and the worst polluters would get the largest easements. The "best" pollution control technology would never have to be installed, and existing plants would use up much of the available clean air, inhibiting construction of new plants (which would comply with the NSPSs).

Id. at 329-30 n.40.

37. *ASARCO* was written broadly; one might well read it to imply that the bubble concept is inappropriate to any portion of the Clean Air Act. *See, e.g., id.* at 327, 329 ("we find that *any* version of the bubble concept is incompatible with the language of the Act and contrary to its [air quality enhancing] purpose") (emphasis in

These decisions, particularly the *Alabama Power* panel's reconciliation of its holding with *ASARCO, see supra* note 37, establish as the law of this Circuit a bright line test for determining the propriety of EPA's resort to a bubble concept. The bubble concept, *Alabama Power* declares, is mandatory for Clean Air Act programs designed merely to maintain existing air quality; it is inappropriate, both *ASARCO* and *Alabama Power* plainly signal, in programs enacted to improve the quality of the ambient air.[38]

Applying the *Alabama Power-ASARCO* test to the nonattainment provisions of the Act, we must conclude that

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original). *Alabama Power* narrowed *ASARCO's* scope by indicating that, although the Act as a whole is designed to enhance (not simply maintain) air quality, in ruling upon the application *vel non* of the bubble concept, the court must look to the purpose of the Clean Air program at issue.

38. EPA has attempted to reconcile *Alabama Power* and *ASARCO* differently. The agency asserts that the NSPS program reviewed in *ASARCO* "focuses exclusively on what demonstrated technology can achieve" on an individual piece of equipment. EPA Brief at 26. On the other hand, the PSD program examined in *Alabama Power* "is principally geared to the effects of emissions from a new or modified source on air quality." *Id.* It is a plant's *net* emission increase, EPA contends, which affects air quality. *Id.* at 27. Describing Part D of the Act as geared to emissions rather than to technology, EPA readily concludes that the bubble concept is appropriately applied to the nonattainment program, just as it is to the PSD program, which is similarly oriented to the effect of emissions on air quality.

This attempted distinction is infirm. First, we note that the nonattainment scheme does contain technology-forcing provisions. *See* 42 U.S.C. § 7503(2) (Supp. IV 1980); *see also* H.R. Rep. No. 294, 95th Cong., 1st Sess. 215 (1977) ("the technology-forcing purpose . . . is best served by requiring maximum feasible pollution control from . . . new sources in dirty air areas"). Second, and of greater importance to our decision, the proffered distinction surely is not the one *Alabama Power* drew. That decision focuses cleanly on whether the program at issue is designed to improve or simply to maintain air quality. *See* 636 F.2d at 401-02.

the bubble concept may not be employed in that scheme.[39] The nonattainment program's *raison d'être* is to ameliorate the air's quality in nonattainment areas sufficiently to achieve expeditious compliance with the NAAQSs.[40] *See supra* note 6 and accompanying text. This purpose comfortably places Part D on the "improving" side of the line drawn by *Alabama Power* and *ASARCO* and thus

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39. Both Petitioners and Intervenors claim support for their opposing bubble concept positions in the 1977 Amendments' legislative history. *Compare* Brief for Petitioners at 42-44 *with* Brief for Industry Intervenor-Respondents at 37-39. We agree with EPA that "[w]ith regard to the actual content of the definition of 'source,' the legislative history is at best contradictory," EPA Brief at 17; therefore, the purposes of the nonattainment program should guide our decision here. *Id.* at 20. We regret, of course, that Congress did not advert specifically to the bubble concept's application to various Clean Air Act programs, and note that a further clarifying statutory direction would facilitate the work of the agency and of the court in their endeavors to serve the legislators' will.

40. EPA strenuously argues that the purpose of the construction moratorium, *see supra* pp. 8-9, is solely to maintain the air's quality in nonattainment areas until the revised SIPs are in place. Therefore, EPA reasons, the bubble concept is eminently suitable for the moratorium program. *See* EPA Brief at 33-36. Petitioners dispute EPA's premise. They claim that the purposes of the moratorium are two-fold, both directed at improving air quality: (1) to pressure the states into rapidly adopting revised SIPs; and (2) to prevent construction or modification of sources with less stringent pollution control than the revised SIP might require once implemented. Brief for Petitioners at 14. In light of these asserted purposes, Petitioners conclude that the bubble concept is incompatible with the moratorium program.

We need not resolve this dispute for EPA has examined the moratorium with tunnel vision. Whatever role the moratorium is to play, it has been cast, not as a discrete program, but as an integral part of a larger production, the nonattainment scheme. Application of the bubble concept to the moratorium, thereby excluding a significant portion of industry's activities from its provisions, would not serve the NAAQS achievement purposes and goals of the nonattainment program.

rules out application of the bubble concept to the nonattainment program.[41]

EPA argues that we have misperceived the purpose and nature of the nonattainment program. The agency asserts that a fundamental purpose of the nonattainment scheme is to afford the states flexibility in designing revised SIPs which will attain compliance with the NAAQSs. *See* EPA Brief at 20-23 (quoting H.R. Rep. No. 294, *supra* note 38, at 211). The bubble concept, EPA argues, would further this statutory purpose by leaving the states with considerable authority to define source as they believe best-advised: they might adopt the bubble concept or, if necessary for timely attainment, a more stringent standard. Regardless of the method chosen, EPA maintains, the states remain under an obligation to submit and comply with a revised SIP that assures improved air quality. Fulfillment of the other prime purposes of the nonattainment program, timely compliance with the NAAQSs and reasonable further progress toward

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41. In promulgating the August 7, 1980, regulations, EPA clearly expressed its belief that the dual definition, by "bring[ing] in more sources or modifications for review than would the plant-wide definition" was "more consistent with Congressional intent" to reduce emissions, improve air quality, and require better pollution control technology in nonattainment areas. 1980 Regulations, 45 Fed. Reg. at 52697-98. In explaining its October 14, 1981, revisions, EPA suggested just the opposite: the dual definition may in fact retard improvement in air quality by discouraging replacement of older processes or equipment with newer, cleaner varieties. 1981 Regulations, 46 Fed. Reg. at 50768; *see also* Notice, 46 Fed. Reg. at 16281. However, in abandoning its earlier position, EPA did not cite, nor have we found in the record, any study, survey, or support for the opposite position, now tendered by EPA, that the dual definition would indeed retard improvement of air quality *in the aggregate*. Therefore, EPA's decision to implement the bubble concept, if based on this rationale, would not rise to the level of reasoned decisionmaking for EPA "has some burden . . . to show that a regulation once considered to [effectuate policy] efficiently can no longer be expected to do so." State Farm Mut. Auto. Ins. Co. v. Department of Transportation, 680 F.2d 206, 231 (D.C. Cir. 1982). Speculation is not enough.

that goal, EPA asserts, is thereby assured. Thus, EPA concludes, application of the bubble concept to the nonattainment scheme fits neatly within the "purpose" language of *Alabama Power*. We disagree.

As we recently pointed out, *see Wilson v. Johns-Manville Sales Corp.*, ... F.2d ....., ... & n.36, No. 81-2019, slip op. at 15 & n.36 (D.C. Cir. July 30, 1982), the legal significance of a word or phrase must be gleaned from the context in which it is used. In the *Alabama Power-ASARCO* context, "purpose" clearly means goal, objective. The goal of the nonattainment program is undoubtedly to improve air quality in regions lagging behind in meeting the NAAQSs. Offering flexibility to the states may be a method of attaining that objective, but it is not an independent goal of the nonattainment scheme.

We further note that the permit and moratorium provisions of Part D are wholly federal requirements imposed on the states. 42 U.S.C. § 7503 (Supp. IV 1980). The states do not retain flexibility to submit SIPs which provides for timely attainment of the NAAQSs, but which does not contain a permit program applicable to new or modified sources.[42] Allowing the states large leeway to define the sources to which the federal requirement applies is not easily reconciled with the statutory design.

B. *The Reconstruction Rule*

EPA explained that it deleted the reconstruction rule from the nonattainment program regulations because, upon the agency's adoption of the plantwide definition of source, the rule would do scant service. *See* 1981 Regulations, 46 Fed. Reg. at 50767; EPA Brief at 40; *supra* p. 13. The bubble concept, pursuant to our decision today, may

42. *See* 123 Cong. Rec. 18017 (1977) (statement of Sen. Muskie).

not be employed in nonattainment program regulations. Therefore, EPA's incidental deletion of the reconstruction rule must be vacated together with the agency decision to which it is ancillary.[43]

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43. Intervenors proffer several alternative reasons supporting EPA's deletion of the reconstruction rule. *See* Brief for Industry Intervenor-Respondents at 59-66. However, it is a "central tenet of administrative law that a reviewing court may not affirm an administrative agency's actions on a reasoned basis different from the rationale actually put forth by the agency." Public Media Center v. FCC, 587 F.2d 1322, 1332 (D.C. Cir. 1978); *see also* Gulf States Util. Co. v. FPC, 411 U.S. 747, 764 (1973); SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

Conclusion

This court's prior adjudications in *Alabama Power* and *ASARCO* preclude us from sanctioning EPA's employment of the bubble concept in the Clean Air Act's nonattainment program. We therefore grant the petition for review and vacate EPA's October 14, 1981, regulations.

So ordered.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982
Argued 5-21-82
Filed Oct 27, 1982

No. 81-2208

Natural Resources Defense Council, Inc.,
Citizens for a Better Environment, Inc.,
Northwestern Ohio Lung Association, Inc.,
Petitioners

v.

Anne M. Gorsuch, Administrator, U.S.
Environmental Protection Agency,
Respondent

American Petroleum Institute, et al.,
Intervenors

BEFORE: Mikva and Ginsburg, Circuit Judges and William J. Jameson*, Senior District Judge for the District of Montana

ORDER

On consideration of the petition for rehearing of intervenor-respondent Chevron U.S.A., Inc., filed September 30, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

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* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982
Argued 5-21-82
Filed Oct 27, 1982

No. 81-2208

Natural Resources Defense Council, Inc.,
Citizens for a Better Environment, Inc.,
Northwestern Ohio Lung Association, Inc.,
Petitioners

v.

Anne M. Gorsuch, Administrator, U.S.
Environmental Protection Agency,
Respondent

American Petroleum Institute, et al.
Intervenors

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

ORDER

Intervenor-respondent Chevron U.S.A., Inc., suggestion for rehearing *en banc* has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

Circuit Judges Wright, Tamm, Edwards and Bork did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982
Argued 5-21-82
Filed Oct 27, 1982

No. 81-2208

Natural Resources Defense Council, Inc.,
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Petitioners

v.

Anne M. Gorsuch, Administrator, U.S.
Environmental Protection Agency,
Respondent

American Petroleum Institute, et al.
Intervenors

BEFORE: Mikva and Ginsburg, Circuit Judges and William J. Jameson*, Senior District Judge for the District of Montana

ORDER

On consideration of the petitions for rehearing filed by respondent and intervenor-respondents, it is

ORDERED by the Court that the aforesaid petitions are denied.

Per Curiam

* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982
Argued 5-21-82
Filed Oct 27, 1982

No. 81-2208

Natural Resources Defense Council, Inc.,
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Petitioners

v.

Anne M. Gorsuch, Administrator, U.S.
Environmental Protection Agency,
Respondent

American Petroleum Institute, et al.
Intervenors

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

ORDER

The suggestions for rehearing *en banc* of respondent and intervenor-respondents (other than Chevron, U.S.A., Inc.) have been circulated to the full Court and a majority of the Court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestions are denied.

Per Curiam

Circuit Judges Wright, Tamm, Edwards and Bork did not participate in the foregoing order.
Circuit Judge MacKinnon would grant the suggestions for rehearing *en banc*.

Appendix C

Section 110 of the Clean Air Act, *as amended*, 42 U.S.C. § 7410, provides in relevant part:

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the

attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

• • •

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 7501(2) of this title) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D of this subchapter (relating to nonattainment areas);

Section 111 of the Clean Air Act, *as amended,* 42 U.S.C. § 7411, provides:

(a) For purposes of this section:

• • •

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

Section 171 of the Clean Air Act, *as amended,* 42 U.S.C. § 7501, provides:

For the purpose of this part and section 7410(a)(2)(1) of this title—

• • •

(4) The terms "modifications" and "modified" mean the same as the term "modification" as used in section 7411(a)(4) of this title.

Section 172 of the Clean Air Act, *as amended*, 42 U.S.C. § 7502, provides:

(a)(1) The provisions of an applicable implementation plan for a State relating to attainment and maintenance of national ambient air quality standards in any nonattainment area which are required by section 7410 (a)(2)(1) of this title as a precondition for the construction or modification of any major stationary source in any such area on or after July 1, 1979, shall provide for attainment of each such national ambient air quality standard in each such area as expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982.

(2) In the case of the national primary ambient air quality standard for photochemical oxidants or carbon monoxide (or both) if the State demonstrates to the satisfaction of the Administrator (on or before the time required for submission of such plan) that such attainment is not possible in an area with respect to either or both of such pollutants within the period prior to December 31, 1982, despite the implementation of all reasonably available measures, such provisions shall provide for the attainment of the national primary standard for the pollutant (or pollutants) with respect to which such demonstration is made, as expeditiously as practicable but not later than December 31, 1987.

(b) The plan provisions required by subsection (a) of this section shall—

• • •

(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 7503 of this title (relating to permit requirements);

Section 173 of the Clean Air Act, *as amended,* 42 U.S.C. § 7503, provides:

The permit program required by section 7502(b)(6) of this title shall provide that permits to construct and operate may be issued if—

• • •

(4) the applicable implementation plan is being carried out for the nonattainment area in which the proposed source is to be constructed or modified in accordance with the requirements of this part.

Appendix D

INTERVENOR-RESPONDENTS IN THE PROCEEDINGS BELOW (Other than Chevron U.S.A. Inc.)

Chemical Manufacturers Association
Rubber Manufacturers Association, Inc.
General Motors Corporation
American Iron and Steel Institute
Allegheny Ludlum Steel Corporation
Armco Inc.
Bethlehem Steel Corporation
Carpenter Technology Corporation
Inland Steel Company
Jones & Laughlin Steel Corporation
Republic Steel Corporation
United States Steel Corporation
American Petroleum Institute
Atlantic Richfield Company
Conoco Inc.
Exxon Corporation
Gulf Oil Corporation
Marathon Oil Company
Mobil Oil Corporation
Phillips Petroleum Company
Shell Oil Company
Standard Oil Company (Indiana)
Texaco Inc.
The Standard Oil Company (Ohio)
Union Oil Company of California
Alabama Power Company
Appalachian Power Company
Arizona Public Service Company

The Hartford Electric Light Company
Holyoke Water Power Company
Western Massachusetts Electric Company
Northern Indiana Public Service Company
Ohio Edison Company
Pennsylvania Power Company
Ohio Power Company
Ohio Valley Electric Corporation
Oklahoma Gas and Electric Company
Pacific Gas and Electric Company
Pennsylvania Power & Light Company
The Potomac Edison Company
Potomac Electric Power Company
Public Service Company of Indiana, Inc.
Public Service Electric and Gas Company
Rochester Gas and Electric Corporation
Salt River Project
San Diego Gas & Electric Company
Southern California Edison Company
Tampa Electric Company
Texas Utilities Generating Company
Toledo Edison Company
Tucson Electric Power Company
Union Electric Company
Virginia Electric and Power Company
West Penn Power Company
Wisconsin Electric Power Company
Wisconsin Power and Light Company
Wisconsin Public Service Corporation
the Edison Electric Institute
the National Rural Electric Cooperative Association

Baltimore Gas and Electric Company
Boston Edison Company
Carolina Power & Light Company
Central and South West Corporation
Central Power and Light Company
Public Service Company of Oklahoma
Southwestern Electric Power Company
West Texas Utilities Company
Central Hudson Gas & Electric Corporation
Central Illinois Light Company
Central Illinois Public Service Company
Central Main Power Company
The Cincinnati Gas & Electric Company
Columbus and Southern Ohio Electric Company
Commonwealth Edison Company
Consolidated Edison Company of New York, Inc.
Consumers Power Company
The Dayton Power and Light Company
Delmarva Power & Light Company
The Detroit Edison Company
Duke Power Company
Florida Power Corporation
Florida Power & Light Company
Georgia Power Company
Gulf Power Company
Gulf States Utilities Company
Houston Lighting & Power Company
Illinois Power Company
Indiana & Michigan Electric Company
Indianapolis Power & Light Company
Iowa-Illinois Gas and Electric Company
Iowa Power and Light Company
Iowa Public Service Company
Kansas City Power & Light Company
Kentucky Power Company
Kentucky Utilities Company
Madison Gas and Electric Company
Arkansas Power & Light Company
Louisiana Power & Light Company
Mississippi Power & Light Company
New Orleans Public Service, Inc.
Mississippi Power Company
Monongahela Power Company
Nevada Power Company
New England Power Company
New York State Electric & Gas Corporation
Niagara Mohawk Power Corporation
Northeast Utilities Service Company
The Connecticut Light and Power Company